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17 UNITED STATES DISTRICT COURT

18 SOUTHERN DISTRICT OF CALIFORNIA

19 Hon. Anthony J. Battaglia

20 SILVESTRE ESTRADA, et. al.,
21 *Plaintiffs,*
22 v.
23 UNITED STATES OF AMERICA
24 *Defendant.*

No. 22-CV-0373-AJB (BGS)

**Plaintiffs' Opposition to Defendants'
Motion for Summary Judgment and
Cross-Motion for Summary Judgment**

Hearing Date: 12/18/23 @ 3:00 p.m.
Courtroom 4A

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1 **Plaintiffs’ Opposition to Defendant’s Motion for Summary Judgment**
2 **and Cross-Motion for Summary Judgment**

3 **I. INTRODUCTION**

4
5 SILVESTRE ESTRADA did not have to die, nor his son left fatherless. The
6 MADARIAGA cousins did not have to witness the shooting death. Nor did they
7 deserve to fear for their own lives at the hands of law enforcement any more than being
8 unwilling participants in a high-speed chase.

9 Despite the Government’s efforts to misdirect attention to the chase itself, the
10 circumstances on the grassy knoll that night present the Court with a simple, yet not
11 easy, question. Is it more likely than not that “the use of deadly force to stop a slow-
12 moving [6-7 m.p.h.] vehicle [was] unreasonable [because] the officers could have
13 easily stepped out of the vehicle's path to avoid danger”? *Villanueva v. California*, 986
14 F.3d 1158, 1170 (9th Cir. 2021).

15 The answer is yes. Visibility was good, the ground was level and dry, and the
16 agents were wearing appropriate footwear. The car was surrounded by 6 CBP vehicles
17 and had no realistic route of escape. Up to this point, ESTRADA had made every effort
18 to avoid hitting anyone, including Agent Baker, who was able to avoid the car moving
19 at him at 20 mph by jumping out of the way.

20 According to policy and sound police practice, Agent Godreau, the only agent
21 potentially at risk, should never have been anywhere near the front of a car with its
22 engine running in what he himself deemed a “dynamic situation.” More importantly, he
23 was not directly in front of the car, and nothing was preventing him from safely getting
24 out of its way by taking a few quick steps to his left. This would have enabled him to
25 easily avoid a slowly moving (5-7 mph) car that was turning away from him to the left.
26 Someone flinched, and now someone is dead.

27 Because these basic, undisputed facts satisfy the aforementioned legal standard,
28 Plaintiffs, not Defendant, are entitled to summary adjudication on the issue of liability.

1 **II. STATEMENT OF MATERIAL FACTS**

2 **A. The Photographic, Forensic and Testimonial Evidence**

3
4 Much of the material facts are not in dispute¹, at least until the parties pulled into
5 the Circle-K gas station. For the sake of brevity, Plaintiffs accept the facts alleged on
6 pages 1-5 of the Government’s pleadings.²

7 The vehicle entered the Circle K gas station located at the intersection of
8 Highway 94 and Campo Road/Buckman Springs Road, pursued by six Border Patrol
9 Vehicles. There is only one way in or out of the gas station. Eyewitness Trent
10 Heimerdinger³ testified to an entrance at the rear of the parking lot. That road, however,
11 is blocked by a gate that is always locked. (Exh L @ MSJ 780, Heimerdinger 29:9–13;
12 Exh Z, AA & BB @ MSJ 975-979⁴). The vehicle drove to the back, looking for an exit,
13 but found there was none, so it headed back toward the entrance, then blocked off by
14 the Border Patrol. (Exh AA @ MSJ 977, DD @ MSJ 982)

15 The weather was clear & visible. (Exh 24 @ MSJ 421; Exh F @ MSJ 662; see
16 <https://www.wunderground.com/history/daily/us/ca/campo/MMTJ/date/2021-5-14>)

17 The gas station was well-lit, although the Sheriff used artificial lighting as well.
18 (Exh A @ MSJ 549, Exh B @ MSJ 580, Exh EE-FF @ MSJ 983-984). The terrain was
19 flat, dry, and level. (Exh 26 @ MSJ 470; Exh 30 @ MSJ 509; Exh EE-HH @ MSJ
20 984-989)

21 ESTRADA drove too fast throughout the Circle K parking lot, but in fact, during
22 the entirety of the chase, took care to avoid any collision with any vehicles, persons, or
23

24
25 ¹ Plaintiffs endeavor to rely as much as possible upon forensic and photographic evidence as
26 opposed to self-serving, subjective statements.

27 ² The Agents had no idea ESTRADA was under the influence of methamphetamine or on parole, so
28 these facts could not be deemed relevant to the use of force calculus. (Gov’t P&A @ 3:15-16, Exh 28
@ MSJ 485-486)

³ see Exhibits W, X & Y @ MSJ 972-974 for his vantage pint and path of travel.

⁴ different arial photographs of gas station

1 stationary objects. (Exh K @ MSJ 755, Moreno 52:1–8)⁵.

2 ESTRADA continued onto the grassy area abutting Highway 94. (Exh D @ MSJ
3 609, Alba 20:3–18; Exh CC-DD @ MSJ 980-982). At the same time, Baker was
4 positioned on the other side of the fence along Highway 94. (Exh E @ MSJ 623, Baker
5 13:18–23; Exh NN @ MSJ 995). Baker recounts ESTRADA moving at speeds
6 estimated at 15–20 miles per hour and driving towards him. (Exh E @ MSJ 624, Baker
7 17:3–6). Despite this speed, admittedly excessive for a parking lot, Baker was able to
8 perform an evasive maneuver and position himself in a safe location. (Exh E @ MSJ
9 624, Baker 17:24–18:7). ESTRADA did not continue traveling in the direction of
10 Baker, but instead turned and drove parallel to Highway 94 in the grassy area heading
11 eastbound in an attempt to reach the paved driveway. (Exh E @ MSJ 624, Baker
12 17:3–16).

13 ESTRADA struck the easternmost curb, approximately 20–24 inches high,
14 causing significant damage to the front bumper, and rendering the vehicle temporarily
15 immobilized. (Exh D @ MSJ 609–610, Alba 20:19–21:2; Exh MM @ MSJ 994). At
16 this point, multiple CBP Agents exited their vehicles, which had circled ESTRADA’s
17 car. (Exh H @ MSJ 683, Patch 12:17–21; Exh F @ MSJ 646, Godreau 45:20–46:18;
18 Exh D @ MSJ 610, Alba 22:22–23:5). ESTRADA was effectively contained, with no
19 practical avenue of escape. (Exh NN @ MSJ 995)

20 Driving in reverse at a speed of approximately 6-7 mph (Exh 26 @ MSJ 472),
21 ESTRADA’s car came to a halt approximately 1–2 feet forward of the bumper of Agent
22 Perez’s vehicle. His engine remained on. (Exh I @ MSJ 701, Perez 17:6–15; see also
23 photographs at Exh HH @ MSJ 986).

24 What follows next is highly in dispute. There was a series of contradictory
25 testimony placing CBP Agents in undeterminable locations. The Government attempts
26 to frame this testimony as the unequivocal truth and goes as far as commissioning a
27 video recreation that portrays the relative positions of each agent in the light most

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⁵ Although FRANCISCO testified ESTRADA was driving “slow” through the parking lot. (Exh J @ MSJ 729 FRANCISCO 86:22–87:1)

1 favorable to it. Exh 36 @ MSJ 515; Exh OO @ MSJ 997).

2 Agent Alba testified his vehicle was parked near the gas pumps, parallel to the
3 grassy area, when he exited and began approaching ESTRADA's vehicle on foot. (Exh
4 D @ MSJ 610, Alba:22:22–23:5). Baker placed himself at 12:00 (right in front of
5 ESTRADA's vehicle) as he was approaching, despite it being impossible due to the
6 location his vehicle was parked and other testimony contradicting his perceived
7 position. (Exh E @ MSJ 625, Baker 24:1–4; Exh D @ MSJ 611, Alba 28:2–22). Patch
8 placed himself between 10–15 feet at the 1:00 position from ESTRADA's vehicle. (Exh
9 H @ MSJ 684, Patch 13:15–22). At the same time, Baker recalls seeing three CBP
10 Agents forming a triangle shape around ESTRADA's vehicle. (Exh E @ MSJ 625,
11 Baker 24:1–4).

12 Godreau had positioned his vehicle in the Circle K driveway. (Exh F @ MSJ
13 646, Godreau 45:15–20; Exh AA @ MSJ 977). He exited his vehicle and was the sole
14 agent to approach on foot at the same time ESTRADA had come to a halt 1–2 feet from
15 Perez's vehicle. (Exh F @ MSJ 646, Godreau 46:5–9). This manner of approach was a
16 gross violation of policy. (Exhibit SS @ MSJ 1019–1020 (Smith Declaration at pages
17 4–5), citing Exhibit M, MSJ No. 802). Witness Brian Moreno, an off-duty SDPD
18 Officer, stated that such a movement was inconsistent with his own training. (Exh K @
19 MSJ 764-765 (Moreno 89:15 - 90:16

20 Godreau's exact location when the car began moving forward to the left at 6–7
21 mph is highly disputed. Godreau placed himself at the 10:30–11:00 position when shots
22 were fired. (Exh F @ MSJ 646, Godreau 46:19–25). Alba placed Godreau in the
23 11:00–12:00 position. (Exh D @ MSJ 611, Alba 25:1–26:5). Agent Matthews testified
24 Godreau was closer to the tree on the left side of the suspect vehicle. (Exh G @ MSJ
25 675, Matthews 39:11–16; Exh ___ @ MSJ ___). Detective Robert Powers corroborated
26 Matthews' estimate of Godreau's location, as noted in Deposition Exhibit 116, marked
27 with a "G". (Exh A @ MSJ 989, Powers 120:3–15; Exh II @ MSJ 988)

28 Alba recalled seeing Godreau about 6 feet from the vehicle. (Exh D @ MSJ 610,

1 Alba 24:16–24). Godreau himself testified to being 10 feet away at the moment he
2 discharged his weapon. (Exh F @ MSJ 650, Godreau 61:4–11).

3 The discrepancy is depicted in a screenshot of a video prepared by Defendant’s
4 expert witness, Jason Fries, purporting to illustrate the relative position of all of the
5 Agents. Godreau is depicted as being 1-2 feet in front of the Nissan. This illustration
6 generously extends the tree canopy to encompass Godreau in an attempt to mitigate the
7 significant disparities in his purported location. (Exh OO @ MSJ 996)

8 As Agents converged on the stationary vehicle, they began yelling conflicting
9 and confusing commands to ESTRADA. Perez recalls yelling “stop,” “don’t move,”
10 and “get out of the vehicle.” (Exh I @ MSJ 702, Perez 21:10–12). Alba yelled “stop.”
11 (Exh D @ MSJ 611, Alba 26:5) Agent Patch and Matthews were yelling “stop the
12 vehicle.” (Exh H @ MSJ 684, Patch 13:7; Exh G @ MSJ 669, Matthews 16:5).
13 Godreau was yelling “show me your hands,” “hands up,” “put your hands up.” (Exh F
14 @ MSJ 646, Godreau 46:12–16). Baker was yelling “place your vehicle in park,” and
15 “turn off your engine.” (Exh E @ MSJ 628, Baker 35:18). Obviously, any action by
16 ESTRADA in this moment would have been unsatisfactory to the CBP Agents who
17 were all yelling conflicting commands.

18 The agents all testified that a loud revving noise emanated from ESTRADA’s
19 vehicle. (Gov’t P&A @ 9:14–10:6). Alba and Perez testified that at the moment of the
20 revving, the vehicle was not in motion. (Exh D @ MSJ 614, Alba 37:21–38:4; Exh I @
21 MSJ 699, 701, Perez 19:2–3, 10–11). Moments later, ESTRADA’s vehicle began to
22 move forward **to the left** at a crawl uncharacteristic of the earlier revving and estimated
23 by expert witness Stephen Plourd to be traveling at 6–7 miles per hour. (Exh E @ MSJ
24 629, Baker 39:15–19, Exh LL @ MSJ 992-993))

25 Mr. Heimerdinger characterized the vehicle’s speed to be similar to that of a
26 vehicle in a parking lot. (Exh L @ MSJ 796, Heimerdinger 92:17–22). This is a far
27 departure from Defendant’s contention that ESTRADA’s vehicle “kicked” into gear and
28 lurched forward and began accelerating “rapidly” towards Godreau. Alba, who was

1 standing right next to the car, did not see *any* dirt or gravel being kicked up, a typical
2 result expected of a vehicle that is rapidly accelerating on rough terrain. (Exh D @ MSJ
3 614, Alba 38:11–19).

4 Despite Alba and Perez’s testimony that the vehicle was not in motion while
5 revving, Godreau recalls that “the vehicle came at a fast rate towards [him]” and he
6 felt that the situation was “rapidly evolving.” (Exh F @ MSJ 646, Godreau 46:5–18).
7 In actuality, 2–4 seconds elapsed between the time the vehicle revved and when it
8 began to move slowly and to the left, away from Godreau. (Exh H @ MSJ 684, Patch
9 16:2–4). This is clearly depicted in the best video evidence available, Subway
10 employee Matthew Delgado’s cell phone video. (Exh 31 @ MSJ 510)

11 Despite Godreau having an unobstructed path to his left to avoid the car, he did
12 not move. Instead, he fired three shots toward ESTRADA’s vehicle. None of his shots
13 struck ESTRADA or the cousins. Matthews, who was positioned on the other side of
14 the fence along Highway 94 and also had ample time to move out of the path of the
15 slow-moving vehicle, fired one shot. (Exh G @ MSJ 670–671, Matthews, 20:17–21:3)
16 This was Matthews’ first high-speed chase, and he had only been on the job less than a
17 year. (Exh G @ MSJ 667, Matthews 7:18–20)

18 Alba, who was positioned near the passenger-side door, fired immediately after
19 hearing gunshots from Godreau, believing that ESTRADA was going to hit Godreau.
20 (Exh D @ MSJ 613–614, Alba 33:7–12, 36:19–37:4) The bullet entered through the
21 rear passenger side window and struck ESTRADA in the neck. Alba knew that when
22 someone is shot, they may lose control of their vehicle. (Exh D @ MSJ 614, Alba
23 39:18- 40:4).

24 Despite the fact that ESTRADA took pains during the entirety of the chase to
25 avoid hitting anybody, Godreau contends “[he] did not believe [he] had time to get out
26 of the way” and “even if [he] tried to move out of the way, [he] believed that
27 [ESTRADA] would have just turned towards [him]. (Exh 16 @ MSJ 261, Godreau
28 Decl. 3:13–17). Alba recalls never seeing Godreau attempting to evade the vehicle.

1 (Exh D @ MSJ 611, Alba 27:16–24). Godreau was wearing a standard CBP issued
2 uniform that came equipped with boots suitable for rough terrain. (Exh D @ MSJ 611,
3 Alba 27:5–15). Baker recalled seeing no obstacles in Godreau’s way that would
4 otherwise prevent him from evading the Nissan. (Exh E @ MSJ 632, Baker 51:20–24;
5 Exh LL @ MSJ 992).

6 Matthews saw ESTRADA’s vehicle turning away from Godreau’s position. (Exh
7 G @ MSJ 675, Matthews 39:12–16). At this point, ESTRADA’s vehicle was past the
8 threshold of posing any possible harm to Godreau. (Exh E @ MSJ 632, Baker
9 51:20–24; Exh HH @ MSJ 986).

10 After the shooting, Patch, the ranking agent on scene, (who did not shoot
11 because he was rightfully concerned about crossfire) did not instruct anyone to secure
12 the crime scene. Instead, Patch instructed all the agents to return to the CBP substation.
13 (Exh D @ MSJ 615, Alba 42:9–15; Exh H @ MSJ 692, Patch 47:17–19). At the
14 substation, no efforts were made to physically segregate the agents involved (Exh F @
15 MSJ 652, Godreau 71:25–72:4) as Homicide Detective Powers would have preferred in
16 order to enhance the reliability of the investigation. (Exh A @ MSJ 547, Powers
17 66:11–21). All agents were sitting in the same room when a union lawyer arrived and
18 met with multiple agents at once. (Exh E @ MSJ 630, Baker 42:15–43:21; Exh F @
19 MSJ 661, Godreau 106:16–23).

20 The Sheriff’s Department was notified at 10:25 p.m. and at 10:44 p.m., Deputies
21 Katrantzis and Gimeno were the first to arrive on scene. (Exh C @ MSJ 595–596,
22 Katrantzis 16:23–17:17). Upon arriving, Katrantzis recalled the crime scene being
23 unsecured, with ESTRADA’s vehicle having “no [agents] around it” and “no border
24 patrol vehicles in the Circle K parking lot.” (Exh C @ MSJ 596, Katrantzis 17:8–14;
25 18:6–7). This confused Katrantzis, who later found out all CBP Agents involved in the
26 shooting had returned to the substation (Exh C @ MSJ 596, Katrantzis 18:8–11;
27 18:18–19:1)⁶. Because of this, Katrantzis was unable to interview any agents involved

28

⁶ As J.C. Smith has explained, the placement of the vehicles at the time of the shooting was an important piece of evidence. Had the vehicles remained, the Homicide Team could have established

1 in the shooting. (Exh C @ MSJ 600, Katrantzis 34:20–22).

2 Around 1:32 a.m., Sheriff’s Homicide Detective Robert Powers and his
3 Homicide Team, including several criminalists, arrived on scene. (Exh A @ MSJ 538,
4 Powers 30:1–10). Deputies undertook to search for evidence, including bullet casings
5 (Exh C @ MSJ 599, Katrantzis 30:10–17). They took care to not needlessly walk on
6 the grassy area in fear of contaminating the crime scene. (Exh C @ MSJ 598,
7 Katrantzis 25:22–26:4). Throughout the night and into the next day, Deputies searched
8 for evidence and interviewed witnesses, like off-duty SDPD Officer Brian Moreno,
9 who had been allowed to leave to the dismay of Deputy Katrantzis. (Exh C @ MSJ
10 596, Katrantzis 19:22–20:7).

11 As a result of his observations of ESTRADA’s vehicle, Detective Powers
12 initially believed that four, not five, shots were fired. (Exh A @ MSJ 546, Powers
13 64:10–16). His search, teamed with criminalist Lauren Sautkaulis, included a thorough
14 examination of the brush where Godreau’s ejected cartridges would have landed given
15 his stated location. (Exh A @ MSJ 564, Powers 134:3–17); Exh HH-KK @ MSJ
16 986–991).

17 Detectives knew that the ejection pattern was to the right, as confirmed by
18 forensics (Exh U @ MSJ 948–953). Finding the casings was an important objective
19 because knowing where Godreau was standing when he discharged his weapon was an
20 important part of the investigation. (Exh A @ MSJ 545, Powers 57:21–58:4)⁷. Despite
21 thorough efforts to search and catalog evidence, the Sheriff’s Department was only able
22 to recover Matthews and Baker’s shell casings. (Exh A @ MSJ 564, 566, Powers
23 135:17–20, 64:10–16; Exh C @ MSJ 989, Katrantzis 29:14–24; Exh HH-KK @ MSJ
24 986–991). The location of Matthews’ cartridge, combined with its ejection pattern,
25 (Exh U @ MSJ 947-951) makes clear that he was not in any danger of being hit by the
26 car. (Exh HH-KK @ MSJ 986–991).

27 _____
28 more accurately whether ESTRADA had a viable avenue of escape between the vehicles parked along
Highway 94 or whether he was seeking to run down Agent Matthews. We will never know for sure.

⁷ As J.C. Smith explained in his report and Declaration.

1 Several hours later, the Agents returned to the scene in their patrol vehicles and
2 staged a walkthrough of the scene and recreation of their, and their vehicles’,
3 “approximate locations”. (Exh A @ MSJ 541-543, Powers 44:11-51:12; Exh NN @
4 MSJ 995).

5
6 **B. Plaintiffs Admissions**

7 Plaintiffs admitted the first 8 admissions identified in the Government’s Motion
8 at section D, pages 12-13.⁸

9 As to the requested Admission (no. 18), that ESTRADA “revved the engine of
10 the Nissan shortly before shots were fired,” only FRANCISCO so admitted. JAIME
11 denied hearing any such noise. (Exhibit 28 @ MSJ 497-498)

12 As to the requested Admission (no. 24) that ESTRADA “drove recklessly
13 through the parking lot,” the MADARIAGA cousins admitted only that this was true
14 prior to the shooting. They denied he had driven recklessly once he had come to a full
15 stop and started to slowly move forward. (Exhibit 28 @ MSJ 501-502)

16 FRANCISCO testified that he observed two Border Patrol agents on foot
17 approximately three and four meters forward of the Nissan at 11:00 and 1:00 o’clock
18 positions (Exh. 9 @ MSJ 496-497) but never stated that this was “nearly straight in
19 front of the vehicle” as the motion asserts.

20
21 **C. Plaintiffs’ Expert J.C. Smith**

22 Retired veteran SDPD Homicide Detective J.C. Smith offered the following
23 opinions:

- 24 1. Shooting at ESTRADA’s vehicle was an unreasonable use of force
25 2. De-Escalation techniques and less than lethal options could have been
26 used
27 3. Sympathetic fire played a role in this shooting

28 ⁸ Plaintiffs recognized they may not “refuse to admit or deny a request for admission based upon a lack of personal knowledge if the information relevant to the request is reasonably available to him.” *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1245, 1247 (9th Cir. 1981)

- 1 4. The scene was not properly secured.
- 2 5. CBP did not follow proper procedure in handing over the investigation
and scene to the Sheriff's Department.
- 3 6. The unrecovered shell casings from Agent Godreau's weapon are a
4 significant factor compromising the integrity of the investigation.
- 5 7. Witnesses should have been separated.
- 6 8. The agents should also have been separated and interviewed sooner.

7 Exhibit 24 @ MSJ 415-457

8 In his enclosed Declaration, Mr. Smith addresses the Government's dismissal of
9 his conclusions. Exhibit SS @ MSJ 1015-1024.

10 **D. Plaintiffs' Expert Stephen Plourd**

11
12 As it relates to critical issues of timing, Mr. Plourd concluded in his report (Exh.
13 26 @ MSJ 467-474) as follows:

- 14 • As Mr. Estrada was traveling east on the grass toward the exit, his
15 vehicle struck a raised concrete curb, which brought his vehicle to a stop.
16 At this time, no agents are in his path and not in any danger.
- 17 • As Mr. Estrada begins to back up his vehicle, he brings his vehicle to a
18 stop due to the agent in the Ford pick-up who has stopped and blocked his
path to an exit.
- 19 • Mr. Estrada backed his vehicle approximately 68 feet in about 5 seconds
20 for an average speed of six to seven miles per hour.
- 21 • Mr. Estrada now stopped for approximately 4 seconds as agents are
22 converging in on the area, in their vehicles and on foot, with no way of
escape.
- 23 • Agent Alba (with his weapon drawn) is moving east along the right side
24 of the car, positioning himself at the right rear area of the passenger door/
window.
- 25 • Agent Godreau (with his weapon drawn) is moving west toward the right
26 front corner of the car.
- 27 • Agent Matthews, who parked his Jeep on the north side of the fence, on
28 the south shoulder of SR-94 and to the north and east of the stopped
Estrada vehicle, is now walking around the rear of his Jeep with his
weapon drawn.

- 1 • Mr. Estrada turns his wheels to the left and starts to move forward.
- 2 • As the vehicle is first starting to accelerate, moving forward and turning
- 3 left, the vehicle moves about five to six feet, traveling 4-5 miles per hour,
- 4 when the first shot is heard.
- 5 • Based on an analysis of the rendering of the iPhone video-shot timing,
- 6 the first shots occur at 1.6 seconds, the second shot is at 1.9 seconds, the
- 7 third shot at 2.23 seconds, the fourth shot at 2.26 seconds and the last shot,
- 8 fifth at 2.7 seconds. (Exhibit 7)
- 9 • These shots all occur in rapid fire for a total duration of 1.1 seconds.
- 10 • The most probable first shot is by Agent Godreau firing into the
- 11 approximate center of the windshield standing near the right front
- 12 approximately 8-12 feet away.
- 13 • The second shot appears to have been made by Agent Alba into the
- 14 passenger side window. Agent Alba was standing to the right of the
- 15 vehicle approximately 5-8 feet away.
- 16 • Shots 3 and 4 were made by Agent Godreau firing in secession into the
- 17 approximate center of the windshield approximately 10-12 feet away from
- 18 the windshield.
- 19 • The last shot was determined to be made by Agent Matthews into the
- 20 upper middle section of the windshield. Agent Matthews was standing
- 21 about 25 feet away on the south shoulder of SR-94 just to the rear of his
- 22 stopped Jeep, firing behind a banner on the fence at a vehicle that was
- 23 nearly stopped.
- 24 • The evidence or lack thereof indicates that the Nissan was not
- 25 accelerating quickly. The video shows a slow accelerating/moving vehicle
- 26 with no evidence of rapid acceleration such as tires spinning or evidence
- 27 of acceleration marks on the ground.
- 28

Exhibit 26 @ MSJ 467-474

In his enclosed Declaration, Mr. Plourd also addresses the deficiencies in the Government's reliance upon Jason Fries recreation video. Exhibit QQ @ MSJ 1010-1013.

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III. SUMMARY JUDGMENT STANDARDS

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. *Fed. R. Civ. P. 56(a)*

Summary adjudication may be appropriate on clearly defined, distinct issues as the rule allows a party to move for summary judgment on any part of a claim. The purpose of summary adjudication is to salvage some results from the judicial effort involved in evaluating a summary judgment motion and to frame narrow triable issues if the court finds that the order would be helpful with the progress of litigation. An order under Rule 56(d) narrows the issues and enables the parties to recognize more fully their rights, yet it permits the court to retain full power to completely adjudicate all aspects of the case when the proper time arrives. *Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc.*, 209 F.Supp.2d 1059, 1065 (E.D.Cal. 2002).

Summary judgment is proper if the evidence shows "there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Fed. R. Civ. P.*, rule 56(c). A factual dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” All justifiable inferences must be drawn in the non-moving party’s favor, and the Court must deny summary judgment if any rational trier of fact could resolve an issue in the non-moving party’s favor. *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties'

1 differing versions of the truth at trial." *T.W. Elec. Serv. v. Pac. Elec. Contr*, 809 F.2d
2 626, 631 (9th Cir. 1987).

3 Determining the reasonableness of an officer's actions is a highly fact-intensive
4 task. *Avina v. United States*, 681 F.3d 1127 (9th Cir. 2012) Therefore, summary
5 judgment in excessive force cases should be granted sparingly, because the
6 reasonableness of force used is ordinarily a question of fact. *Hayes v. Cnty. of San*
7 *Diego*, 736 F.3d 1223, 1236 (9th Cir. 2013)(emphasis added) Proof of specific intent to
8 deprive one of constitutional rights is not required. *Caballero v. City of Concord*, 956
9 F.2d 204, 206 (9th Cir. 1992). In excessive force cases resulting in death, the trial court
10 "must carefully examine all the evidence in the record, such as medical reports,
11 contemporaneous statements by the officer and the available physical evidence, as well
12 as any expert testimony proffered by the plaintiff, to determine whether the officer's
13 story is internally consistent and consistent with other known facts." *Scott v. Henrich*,
14 39 F.3d 912, 915 (9th Cir. 1994);

15 A court "cannot simply accept what may be a self-serving account by the police
16 officer." *Cruz ex rel. Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014)(this rule
17 applies even when there is a living non-police eyewitness.)

18 On summary judgment, the evidence need not be presented in a form that would
19 be admissible at trial. Rather, "[a]t the summary judgment stage, we do not focus on the
20 admissibility of the evidence's form. Instead, the Court must focus on the admissibility
21 of its contents." *Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir. 2003); *Tamares*
22 *Las Vegas Props., LLC v. Travelers Indem. Co.*, 409 F. Supp.3d 924, 944–945 (D. Nev.
23 2019)(unsworn version of an expert report does not prevent its admissibility at trial.)⁹

24 Finally, when a video captures the events in question, no genuine dispute of fact
25 exists for anything that is clearly discernable in it, even if sworn testimony in the
26 record contradicts what the video shows. *Scott v. Harris*, 550 U.S. 372, 380–81 (2007);
27 *Castro v. Cnty. of L.A.*, 785 F.3d 336, 346 (9th Cir. 2015)(court and jury are "free to
28

⁹ Police reports can be admissible under Fed. R. Evid. 803(8)(A)(iii)

1 disregard inferences in favor of [a] party where they are belied by a video account in
2 the record.”)

3 **IV. PLAINTIFFS ARE ENTITLED TO PREVAIL ON THEIR CLAIMS**
4 **FOR RELIEF BECAUSE DEADLY FORCE WAS NOT WARRANTED**

5 **A. The Applicable Legal Standards**

6 **1. Federal Tort Claims Act: 28 U.S.C. § 2671 et. seq.**
7

8 The FTCA provides that the United States may be held liable for “personal
9 injury or death caused by the negligent or wrongful act or omission of any employee of
10 the Government while acting within the scope of his office or employment, under
11 circumstances where the United States, if a private person, would be held liable to the
12 claimant in accordance with the law of the place where the act or omission occurred.”
13 28 U.S.C. § 2674. California law thus applies. See *Richards v. United States*, 369 U.S.
14 1 (1962)).

15 Generally, public employees in California “are statutorily liable to the same
16 extent as private persons for injuries caused by their acts or omissions.” *Hayes v. Cnty.*
17 *of San Diego*, 57 Cal.4th 622, 628–29 (2013).

18 Under 28 U.S.C. § 2674, the United States is “liable ‘in the same manner and to
19 the same extent as a private individual under like circumstances.’” “The words ‘like
20 circumstances’ do not restrict a court’s inquiry to the same circumstances, but require it
21 to look further afield.” *United States v. Olson*, 546 U.S. 43, 46 (2005). In other words,
22 the Court must look “beyond [the party’s] characterization to the conduct on which the
23 claim is based.” *Snow-Erlin v. United States*, 470 F.3d 804, 808 (9th Cir. 2006).

24 Neither federal statutes nor the Constitution create a cause of action under the
25 FTCA. *Pereira v. United States Postal Serv.*, 964 F.2d 873, 876 (9th Cir. 1992).
26 However, under California law, claims for wrongful death, assault/battery, and
27 negligence by police officers are analyzed using the same standards as Fourth
28 Amendment excessive force claims. *Brown v. Ransweiler*, 171 Cal.App.4th 516, 527

1 n.11 (2009) ("Because federal civil rights claims of excessive use of force are the
2 federal counterpart to state battery and wrongful death claims, federal cases are
3 instructive in this area"); *Saman v. Robbins*, 173 F.3d 1150, 1156–57 & n.6 (9th Cir.
4 1999).

5 Qualified immunity does not apply in a California law-based FTCA case.
6 *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009)(QI “is a federal doctrine that
7 does not extend to state tort claims against government employees.”); *Venegas v. Cnty.*
8 *of Los Angeles*, 153 Cal.App.4th 1230 (2007)(QI not a defense to a Civ. Code § 52.1
9 action).

10 Nor do any other California law-based immunities, such as Cal. Gov’t Code
11 § 821.6, apply. see *Stuart v. United States*, 23 F.3d 1483, 1488 (9th Cir. 1994).

12 **2. Wrongful Death**

13
14 In California, a plaintiff establishes a claim for wrongful death by demonstrating
15 a “tort (negligence or other wrongful act), the resulting death, and the damages,
16 consisting of the pecuniary loss suffered by the heirs.” *Quiroz v. Seventh Ave. Ctr.*, 140
17 Cal.App.4th 1256, 1263 (2006); *Estate of Martin v. United States*, 2015
18 U.S.Dist.LEXIS 127019, at *40 (S.D. Cal. 2015).

19 **3. Assault**

20
21 “The essential elements of a cause of action for assault are: (1) defendant acted
22 with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a
23 harmful or offensive manner; (2) plaintiff reasonably believed she was about to be
24 touched in a harmful or offensive manner or it reasonably appeared to plaintiff that
25 defendant was about to carry out the threat; (3) plaintiff did not consent to defendant’s
26 conduct; (4) plaintiff was harmed; and (5) defendant’s conduct was a substantial factor
27 in causing plaintiff’s harm.” *Yun Hee so v. Sook Ja Shin*, 212 Cal.App.4th 652,
28 668–669 (2013).

1 “Generally speaking, an assault is a demonstration of an unlawful intent by one
2 person to inflict immediate injury on the person of another then present.” It is based
3 upon an “invasion of the right of a person to live without being put in fear of personal
4 harm.” *Plotnik v. Meihaus*, 208 Cal.App.4th 1590, 1603–1604 (2012). The tort is
5 complete “when the anticipation of harm occurs.” *Kiseskey v. Carpenters’ Trust for*
6 *Southern California*, 144 Cal.App.3d 222, 232 (1983).

7 8 **4. Battery Resulting in Death**

9 CACI Jury Instruction No. 1305B, entitled “Battery by Peace Officer (Deadly
10 Force)—Essential Factual Elements” states that a peace officer may use deadly force
11 only when necessary in defense of human life. To establish this claim, the plaintiff must
12 prove all of the following: (1) That a defendant intentionally touched the decedent or
13 caused the decedent to be touched; (2) That a defendant used deadly force on the
14 decedent; (3) That a defendant’s use of deadly force was not necessary to defend human
15 life; (4) That the decedent was killed; and (5) That a defendant’s use of deadly force
16 was a substantial factor in causing decedent’s death.

17 18 **5. Negligence**

19 To prevail on a claim for negligence, "a plaintiff must show that the defendant
20 had a duty to use due care, that he breached that duty, and that the breach was the
21 proximate or legal cause of the resulting injury." *Hayes v. Cnty. of San Diego*, 57
22 Cal.4th at 629; *Robinson v. City of S.D.*, 954 F.Supp.2d 1010, 1027 (S.D. Cal. 2013)

23 The California Supreme Court has held that "an officer's lack of due care can
24 give rise to negligence liability for the intentional shooting death of a suspect." *Munoz*
25 *v. Olin*, 24 Cal.3d 629 (1979))

26 In *Hayes v. Cnty. of San Diego*, 736 F.3d 1223, the Court stated:

27 The California Supreme Court has . . . clarified California's negligence
28 doctrine in cases where, as here, a plaintiff attacks peace officers' "tactical
conduct and decisions leading up to the use of deadly force." *Hayes v.*
Cnty. of San Diego, 57 Cal. 4th 622, 253 (2013) . . . There is "no sound

1 reason to divide plaintiff's cause of action . . . into a series of decisional
 2 moments . . . and then to permit plaintiff to litigate each decision in
 3 isolation, when each is part of a continuum of circumstances surrounding a
 4 single use of deadly force." Instead, under *Grudt v. City of Los Angeles*, 2
 5 Cal.3d 575 (1970), an officer's preshooting conduct is properly "included
 6 in the totality of circumstances surrounding [his] use of deadly force, and
 7 therefore the officer's duty to act reasonably when using deadly force
 8 extends to preshooting conduct."

9 *Hayes v. Cnty. of San Diego*, 736 F.3d at 1236

10 **6. The Bane Act**

11 Cal. Civ. Code § 52.1, known as the Bane Civil Rights Act, authorizes a claim
 12 for relief "against anyone who interferes, or tries to do so, by threats, intimidation, or
 13 coercion, with an individual's exercise or enjoyment of rights secured by federal or
 14 state law." *Jones v. Kmart Corp.*, 17 Cal.4th 329, 331 (1998); *Allen v. City of*
 15 *Sacramento*, 234 Cal.App.4th 41, 20 (2015)

16 Whether defendants understood they were acting unlawfully [is] not a
 17 requirement. "Reckless disregard of the 'right at issue' is all that [is] necessary."
 18 *Cornell v. City & Cnty. of San Francisco*, 17 Cal.App.5th 766, 804 (2017).

19 **i. The FTCA Allows for Suits Under the Bane Act Based upon 20 State Constitutional Violations**

21 *Reyes v. United States*, 2021 U.S. Dist. LEXIS 29076 (S.D. Cal. 2021) permitted
 22 a Bane Act claim under the California Constitution against the U.S. premised on a
 23 violation of Cal. Const., art. I, § 13. see also *Voeltz v. United States*, 2022 U.S. Dist.
 24 LEXIS 103649, at *7 (CDCA 2022); *Border Patrol Agent Anonymous v. United States*,
 25 2017 U.S. Dist. LEXIS 62883, at *4 (S.D. Cal. 2017)(

26 California courts treat state constitutional analogues as "substantially equivalent"
 27 to the federal provisions. See *Blair v. Pitchess*, 5 Cal.3d 258, 270 n.6 (1971)(Cal.
 28 Const., art. I, § 13 [is] substantially equivalent to the Fourth Amendment"); *Today's*
Fresh Start, Inc. v. Los Angeles Cnty. Office of Educ., 57 Cal.4th 197, 212 (2013)

1 (treating Cal. Const., art. I, § 7 as “substantially overlapping” the Fourteenth
2 Amendment Due Process Clause)

3
4 **ii. Right to Familial Association**

5 It is well-established in the Ninth Circuit that “[t]he standard of culpability for a
6 due process right to familial association claim” is whether the officer’s conduct “shocks
7 the conscience.” *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008); *Gonzalez v.*
8 *City of Anaheim*, 747 F.3d 789, 797 (9th Cir. 2014).

9 To show an officer’s conduct “shocks the conscience,” a plaintiff must
10 demonstrate that the officer “acted with deliberate indifference,” or with a “purpose to
11 harm . . . that was unrelated to legitimate law enforcement objectives,” which is a
12 “more demanding showing.” *Porter v. Osborn*, 546 F.3d at 1137.

13 The deliberate indifference standard applies “only when actual deliberation is
14 practical.” *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998). “On the other
15 hand, where a law enforcement officer makes a snap judgment because of an escalating
16 situation, his conduct may only be found to shock the conscience if he acts with a
17 purpose to harm unrelated to legitimate law enforcement objectives.” *Wilkinson v.*
18 *Torres*, 610 F.3d at 554; *Cnty. of Sacramento v. Lewis*, at 854.

19 'Deliberation' for the purposes of the shocks the conscience test is not so literal a
20 concept;" even when an officer logically could deliberate, the circumstances may
21 necessitate split-second decision making which requires the heightened purpose to
22 harm standard. *Tuggle v. City of Tulare*, 2023 U.S.Dist.LEXIS 112523, at *31 (E.D.
23 Cal. 2023)

1 **B. The Use of Deadly Force to Stop a Vehicle Travelling at 5-7 m.p.h. in a**
2 **Direction Away From The Only Agent In Its Path Was Unreasonable**
3 **as Agent Godreau Could Have Easily Stepped Out of the Vehicle's**
4 **Path to Avoid Danger.**

5 **1. The MADARIAGA Cousins Were Clearly Seized and Can Sue for**
6 **Assault**

7 Initially, the Government suggested the MADIARAGA cousins have no grounds
8 to sue for battery because they were not touched. (Motion at 29:5-7). While true, they
9 can nevertheless sue for assault, as pp 23 of the First Amended Complaint alleges¹⁰.

10 The MADARIAGA cousins were unintended targets but were nevertheless
11 seized within the meaning of the Fourth Amendment. see *Villanueva v. California*, 986
12 F.3d at 1167–1168(“ . . . because Orozco's freedom of movement was terminated when
13 the Officers intentionally shot at the Silverado in which he was a passenger to stop its
14 movement, Orozco was seized within the meaning of the Fourth Amendment. It
15 matters not whether the Officers intended to shoot Orozco or whether they even knew
16 he was present as a passenger. Under clearly established precedent at the time, Orozco
17 was seized.”)

18 Further, “pointing a gun to the head of an apparently unarmed suspect can be a
19 violation of the Fourth Amendment, especially where the individual poses no particular
20 danger.” *Robinson v. Solano Cty.*, 278 F.3d 1007, 1015 (9th Cir. 2002); *Green v. City of*
21 *S.F.*, 751 F.3d 1039, 1052 (9th Cir. 2014).

22 What happened to the MADARIAGA cousins is actionable.

23 **2. General Use of Force Principles**

24 The ultimate question in any use of force case is whether the officers’ actions are
25 “objectively reasonable” in light of the facts and circumstances confronting them,
26 without regard to their underlying intent or motivation. *Graham v. Connor*, 490 U.S.
27 386, 396–97 (1989).

28

¹⁰ If this particular cause of action is ambiguous or unclear, again, the Court looks to the facts to see if liability lies, not the labels attached to them.

1 Factors to consider are: “(1) the severity of the crime at issue, (2) whether the
2 suspect posed an immediate threat to the safety of the officers or others, and (3)
3 whether the suspect was actively resisting arrest or attempting to evade arrest by
4 flight.” *Lowry v. City of San Diego*, 858 F.3d 1248, 1257 (9th Cir. 2017).

5 “Among [the Graham] considerations, the ‘most important’ is the second
6 factor—whether the suspect posed an immediate threat to others.” *Williamson v. City of*
7 *Nat’l City*, 23 F.4th 1146, 1153 (9th Cir. 2022).

8 The most critical moment in the analysis is at the time the excessive force was
9 employed. *Graham v. Connor*, 490 U.S. at 396. “[O]fficers must reassess use of force
10 in an evolving situation as the circumstances change.” *Hyde v. City of Willcox*, 23 F.4th
11 863, 871 (9th Cir. 2022); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) (“A
12 passing risk to a police officer is not an ongoing license to kill an otherwise
13 unthreatening suspect.”); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) (“When an
14 officer faces a situation in which he could justifiably shoot, he does not retain the right
15 to shoot at any time thereafter with impunity.”); *Waterman v. Batton*, 393 F.3d 471, 481
16 (4th Cir. 2005) (“We therefore hold that force justified at the beginning of an encounter
17 is not justified even seconds later if the justification for the initial force has been
18 eliminated.”); *Lytle v. Bexar Cnty. Tex.*, 560 F.3d 404, 413 (5th Cir. 2009) (while a car
19 might have pose an immediate and significant threat of harm when backing up towards
20 an officer, “an exercise of force that is reasonable at one moment can become
21 unreasonable in the next if the justification for the use of force has ceased.”)

22 As is the case under California negligence law, a jury may consider
23 “unreasonable police conduct prior to the use of force that foreseeably created the need
24 to use it” as part of the totality of the circumstances in the objective reasonableness
25 assessment. *Winkler v. City of Phoenix*, 849 F.App’x 664, 667 (9th Cir. 2021); see also
26 *Orn v. City of Tacoma*, 949 F.3d 1167, 1176 n.1 (9th Cir. 2020) (a jury may consider
27 whether “a police officer unreasonably places himself in harm’s way” to evaluate
28 whether his use of deadly force was excessive in the totality of the circumstances).

1 The evaluation of excessive force still considers whether the officer was "simply
2 responding to a preexisting situation" or whether he "create[d] the very emergency he
3 then resorts to deadly force to resolve." *Nehad v. Browder*, 929 F.3d 1125, 1135 (9th
4 Cir. 2019). On the other hand, a Fourth Amendment violation for excessive force
5 cannot be established "based on merely bad tactics that result in a deadly confrontation
6 that could have been avoided." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th
7 Cir. 2018)

8 While not dispositive, the Court may consider a police department's own
9 guidelines, policies, and training materials in determining whether the force employed
10 was objectively unreasonable. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th
11 Cir. 2003); *Tennessee v. Garner*, 471 U.S. 1, 18–19 (1985)(considering police
12 department policies); *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1414 (9th Cir.
13 1986) (considering LA Police Commission rules in determining whether a choke-hold
14 was reasonably applied); *Peraza v. Delameter*, 722 F.2d 1455, 1456 (9th Cir. 1984)
15 (approving use of police department's canine policy).

16 A desire to resolve quickly a potentially dangerous situation is not the type of
17 governmental interest that, standing alone, justifies the use of force that may cause
18 serious injury. *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001) cert denied
19 536 U.S. 958 (2002)

20 **3. Not Every High-Speed Chase Justifies The Use Of Deadly Force**

21
22 The Government attempts to bring this case within the favorable fact scenarios
23 faced by law enforcement in the midst of a high-speed chase. The problem with this
24 analysis is that the car had come to a complete stop and then was moving forward,
25 away from any officer. Further, as JC Smith has explained, is that officers are trained
26 for these scenarios so that they will not be controlled by the adrenaline rush of what
27 they describe as a "dynamic, fast-moving scenario."

28 "It is not better that all felony suspects die than that they escape." *Tennessee v.*

1 *Garner*, 471 U.S. at 11; *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997)

2 ("Other means exist for bringing the offender to justice, even if additional time and
3 effort are required.")

4 "A moving vehicle can of course pose a threat of serious physical harm, but only
5 if someone is at risk of being struck by it." *Orn v. City of Tacoma*, 949 F.3d 1167, 1174
6 (9th Cir. 2020)(citations omitted). The use of deadly force to stop a recklessly speeding
7 vehicle during a car chase may therefore be reasonable under the Fourth Amendment.
8 *Mullenix v. Luna*, 577 U.S. 7, 15 (2015).

9 "Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the
10 public. As the cases addressing this all-too-common scenario evince, the real inquiry is
11 whether the fleeing suspect posed such a threat that the use of deadly force was
12 justifiable." *Medina v. Cnty. of San Diego*, 2014 U.S. Dist. LEXIS 199840, at *14–15
13 (S.D. Cal. 2014); *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009)(Car chases
14 inherently risk injury to persons who might happen along their course, and if that risk
15 alone could justify shooting the suspect, every chase would end much more quickly
16 with a swiftly-fired bullet. Courts do not minimize that risk, or suggest that the risk to
17 others must always be imminent in order to justify the use of deadly force but "the
18 [Court] did not declare open season on suspects fleeing in motor vehicles.")

19 Where an officer deliberately approaches a car traveling away from him, the
20 Ninth Circuit has questioned whether he could reasonably perceive a threat to his
21 safety. *Earl v. Campbell*, 859 F.App'x 73 (9th Cir. 2021)(citing cases).

22 In *Villanueva v. California*, 986 F.3d at 1170–1172, prior to the shooting,
23 Villanueva slowed to below the speed limit and came to a stop before performing a
24 three-point turn. Even under the Officers' view of the facts, "the truck was moving
25 forward at a speed of up to five miles an hour" when they shot at it.

26 In holding the officers were not entitled to qualified immunity, the Court stated:

27 "We have consistently found use of deadly force to stop a slow-moving
28 vehicle unreasonable when the officers could have easily stepped out of
the vehicle's path to avoid danger. See *Orn v. City of Tacoma*, 949 F.3d at
1175 ("Orn's vehicle was moving at just five miles per hour. [The officer]

1 could therefore have avoided any risk of being struck by simply taking a
2 step back.”); *Acosta v. City & Cnty. of S. F.*, 83 F.3d 1143, 1146 (9th Cir.
3 1996), abrogated on other grounds by *Saucier v. Katz*, 533 U.S. 194
4 (2001) (finding that a reasonable officer “would have recognized that he
could avoid being injured when the car moved slowly, by simply stepping
to the side”). . . .

5 *Acosta* thus clearly established that an officer who shoots at a slow-
6 moving car when he can easily step out of the way violates the Fourth
7 Amendment, as we recently reaffirmed in *Orn v. City of Tacoma*, 949 F.3d
8 1167. . . . “If [the driver] was traveling at only five miles per hour as he
9 maneuvered past [the officer’s] SUV, and if he did not accelerate until
after being shot, a reasonable jury could conclude that [the officer] lacked
an objectively reasonable basis to fear for his own safety, as he could
simply have stepped back to avoid being injured.”

10 Id.

11
12 In *Macias v. City of Delano*, 2022 U.S. Dist. LEXIS 112972 (E.D. Cal. 2022), the
13 Court stated:

14 As in *Villanueva*, here defendant's argument rests entirely on the
15 reasonableness of Officer Mendoza's fear that decedent Macias would
16 intentionally hit him with his truck. . . .

17 Here, "the need for force" in response to any potential threat hangs on at
18 least four disputed material facts: (1) whether defendant Officer Mendoza
19 reasonably believed that decedent Macias posed a threat to his safety when
20 the truck had come to a complete stop; (2) whether defendant Mendoza
21 could have easily moved out of the way of the truck as it briefly moved;
22 (3) whether Macias revved his engine prior to defendant Mendoza's use of
23 lethal force; and (4) whether the truck started moving toward defendant
24 Mendoza before or after he fired his lethal shots. These are all disputed
25 issues of material fact that must be decided by a jury. Because genuine
26 disputes of material fact exist as to "whether the degree of force used was
27 warranted by the government interest at stake," (citation), summary
28 judgment in favor of defendant as to plaintiffs' claim of excessive use of
force in violation of the decedent's Fourth Amendment rights must be
denied.

26 *Macias* at *34–35.

27
28 This case presents 3 of those 4 same issues: (1) whether Agent Godreau

1 reasonably believed that ESTRADA posed a threat to his safety when the truck had
2 come to a complete stop; (2) whether Godreau could have easily moved out of the way
3 of the truck as it briefly moved; and (3) whether ESTRADA revved his engine prior to
4 defendant Mendoza's use of lethal force.

5 In *Estate of Brent Lee Heath v. Pierce Cty.*, 2021 U.S. Dist. LEXIS 122609
6 (W.D. Wash. 2021), the Court denied the officers' motion for summary judgment in a
7 50-90 mph chase in a busy neighborhood which resulted in a fatal shooting. The court
8 concluded that "like in Villanueva and Orn, a reasonable jury could conclude that Mr.
9 Heath was not going anywhere fast and that no officer was in immediate danger." The
10 Court stated:

11 The following facts all appear to have happened within moments. Mr.
12 Heath's vehicle attempted to move in reverse. Officers on the scene saw
13 the front wheels begin to spin and the backup lights go on, but it did not
14 initially start moving. Deputy Shanks claims he could not see Deputy Fry
15 and did not see that the tires were flat, but he knew Deputy Fry's car was
16 on the rear side of the suspect's car and, fearing for Deputy Fry, fired the
17 first shot through the passenger-side window. He recalls experiencing
18 tunnel vision.

17 According to Deputy Fry, he was still on the passenger-side of the suspect
18 vehicle when Deputy Shanks fired that first shot. Fearing that the car
19 would get moving and back onto the road, he ran around its rear toward
20 his vehicle, intending to use it as a roadblock if needed. When asked
21 whether at any point he felt his life was in danger, Fry Responded, "No, I
22 did not feel any danger."

21 Deputy Shanks says that he saw the car lurch in reverse about one foot.
22 According to Deputy Fry, it moved five to ten feet. Deputy Shanks
23 attempted a second shot, but he could not fire because his pistol's
24 magazine had fallen to the ground. Moments later, he loaded a new
25 magazine and fired four more times. Other officers on the scene describe
26 this as being briefly after the first shot. Right before or during the
27 shooting, the suspect's car began moving forward. It came to rest about
28 twenty feet off the side of the road behind a guard rail.

27 *Estate of Brent Lee Heath v. Pierce Cty.*, at *2–5.

28 In *McCaslin v. Wilkins*, 17 F.Supp.2d 840 (W.D.Ark. 1998) Plaintiff's Fourth

1 Amendment claim survived a motion for summary judgment. The decedent was fatally
2 shot by a police officer after he allegedly attempted to run down the officer, who had
3 pursued him in a high-speed chase (which at times reached speeds in excess of 100
4 miles per hour). The decedent's vehicle left the roadway and went down an
5 embankment. Officers contended that the dcedent then began driving out of the
6 embankment moving quickly toward them, forcing them to seek protection and/or
7 protect themselves by the use of deadly force, resulting in the shooting death. The
8 Plaintiff disputed the operability of the vehicle.

9 *Rico v. Cnty. of San Diego*, 2013 U.S. Dist. LEXIS 85588, at *9 (S.D. Cal. 2013)
10 involved a short pursuit that ended at the end of a dirt road. The vehicle stopped next to
11 the officer's vehicle, but quickly backed up and started accelerating forward toward
12 another dirt road, in an effort to get away. The officer exited his vehicle with his
13 weapon drawn and fired 16 shots in a matter of 3.5 seconds at the driver's side of the
14 plaintiff's car as the plaintiff was fleeing the scene. Both plaintiff, who was driving at
15 the time, and the passenger were hit.

16 Judge Moskowitz denied the defense motion for summary judgment because,
17 like here, the parties disagreed over the details of the shooting. "Specifically, they
18 disagree about the position of the Jeep at the moment Tripoli exited the passenger side
19 of the Expedition, whether the Jeep ever moved directly toward Tripoli or "tracked" his
20 movements, and Tripoli's position when he began shooting." Like here, the officer
21 contended the Jeep accelerated to a speed of approximately ten miles an hour as it
22 passed him, giving him "less than a second" to decide whether to open fire. Even
23 though he conceded that he fired at the side and rear of the Jeep – and not at the front –
24 he argued that he made the decision to fire when the Jeep was heading at him, not while
25 it was passing him by. (making it functionally indistinct from this case)

26 In *Acosta v. City & Cnty. of S. F.*, 83 F.3d 1143, an off-duty, plainclothes police
27 officer chased on foot two men he believed had stolen a purse. The men got into a
28 waiting car driven by Acosta. The officer, still in pursuit, positioned himself near the

1 front of the car, standing closer to the side than dead-center. The vehicle then began
2 "moving or rolling very slowly from a standstill" toward the officer. The officer fired
3 two shots into the car, killing Acosta.

4 The Ninth Circuit held that "a reasonable officer could not have reasonably
5 believed that shooting at the driver of the slowly moving car was lawful," as he "would
6 have recognized that he could avoid being injured when the car moved slowly[] by
7 simply stepping to the side," *Id.* at 1146–1148.

8 In *Newman v. City of Philadelphia*, 509 F.Supp.3d 291 (E.D.Pa 2020), a
9 suspicious driver was pulled over. Two police officers exited their vehicle (parked two
10 car lengths in front of the suspect van) and unholstered their firearms. The two officers
11 circled the van in a maneuver called "slicing the pie" in order to get around the van
12 without walking directly in front of it. Officers instructed the suspect to show his hands
13 and put the van in park. As the officers got close, the suspect backed the vehicle up
14 while turning it to face one of the officers. The suspect put the van in drive and began
15 accelerating towards the officer. The officer testified he was about 5 feet away from the
16 van's front bumper and that he attempted to side-step the van but did not have enough
17 time. and so the officer opened fire. Four shots were fired. Forensic evidence shows
18 none of the bullets hit the front windshield or front area of the van. Rather, the driver
19 side window, driver side fender, and three hit the suspect, killing him.

20 The District Court denied the officers' motion for summary judgment, stating
21 "While defendant Coolbough is correct that these facts, *if undisputed*, would likely
22 establish that Ferretti posed an immediate threat of harm to Coolbaugh's safety at the
23 moment he drove toward Coolbaugh, those facts are not undisputed. However, as the
24 Plaintiffs argue, a reasonable jury could find, based on the existing record, that
25 Coolbaugh did not shoot Ferretti: (1) from a point in the immediate and direct path of
26 Ferretti's moving vehicle; and/or (2) until after Ferretti had driven past Coolbaugh such
27 that Coolbaugh was not in danger of being hit."

28 In *Medina v. Cnty. of San Diego*, 2014 U.S.Dist.LEXIS 199840, Judge Bashant

1 stated:

2 In these cases, the "core issue" is "whether the officer reasonably
3 perceived an immediate threat[.]" "focus[ing on] the act that led the officer
4 to discharge his weapon." . . .

5 In this case, there is a genuine factual dispute about the dangerousness of
6 Medina's conduct. At the time of the attempted traffic stop, there were few
7 cars or pedestrians on the streets, and Medina did not exceed the speed
8 limit or travel out of his lane. Although he did drive off the road to avoid
9 spike strips and after various police cars rammed into his truck, he did not
hit or attempt to hit any officers outside of their cars. While his conduct
was certainly dangerous, the facts could reasonably show that it was not
dangerous enough to justify deadly force.

10 Importantly, then, the Court must focus its attention on the act that led the
11 officers to shoot. At the time of the shooting, Medina's truck was pinned
12 between a fence and Ritchie's patrol car. Although Medina seemed to be
13 attempting to escape by rocking his truck back and forth, Ritchie and Nava
14 could clearly see into the passenger compartment and made eye contact
15 with Medina. If Medina then broke free and drove at Ritchie, as some of
16 the officers claimed, deadly force might have been justified. However, it is
reasonable to infer that even if Medina did break free, Ritchie could have
avoided the danger by moving out of Medina's path. Consequently, a less
invasive solution could have been available.

17 Further, Ritchie's statements suggest Medina might have been turning to
18 avoid him. Ritchie stated he could see the tread of the front right tire, with
19 the front of the tire to the left and the back of the tire visible outside the
20 tire well. As Ritchie was standing on Medina's right, the jury could
21 reasonably find that Medina was not an immediate threat to run over
22 Ritchie. In that case, because Nava was positioned near Ritchie and could
see him, it could be unreasonable for Nava to use deadly force. See *Tubar*
v. Clift, 453 F. Supp. 2d 1252, 1256 (W.D. Wa 2006) *aff'd in part,*
dismissed in part 286 F.App'x 348 (9th Cir. 2008) (finding that once a car
is no longer an immediate threat, deadly force is unreasonable). . . .

23 Ultimately, the facts of that chaotic night are currently in genuine dispute.
24 With such disputes, it is difficult to construe a coherent narrative because
25 it relies so heavily on compounding inferences leading to wildly diverging
26 scenarios. It is for the fact finder to parse out the course of events of that
night, and it cannot be properly determined at this stage. . . .

27 *Medina v. Cnty. of San Diego*, at *17–21.
28

1 see also *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008); *Murray-Ruhl v.*
2 *Passinault*, 246 F.App'x 338 (6th Cir. 2007); *Remato v. City of Phoenix*, 2011
3 U.S.Dist.LEXIS 93227 (D. Ariz. 2011); *Jefferson v. Lias*, 21 F.4th 74 (3rd Cir. 2021)

4 **On the other hand**, in *Wilkinson v. Torres*, 610 F.3d 546, a fleeing minivan
5 temporarily came to a stop in a muddy yard after crashing into a telephone pole.
6 Although it was surrounded by police vehicles as well as two officers on foot, the
7 driver continued to attempt to accelerate, as evidenced by the wheels "spinning and
8 throwing up mud." One officer approached the vehicle and fell on the slippery ground.
9 A second officer, believing the first officer had been run over, fired at the driver.

10 The Ninth Circuit held that the officer's use of deadly force was reasonable. It
11 emphasized that the minivan was only moving at a slow speed because it was stuck in
12 the mud; the driver was "revving" the engine and the van "could have gained traction at
13 any time, resulting in a sudden acceleration in speed." Furthermore, the muddy yard
14 was slippery, and the officer who shot the driver had good reason to believe that
15 another officer was either still on the ground or "standing but disoriented"—that is to
16 say, not able to easily move out of the way of an oncoming car no matter its speed. *Id.*
17 at 551-553.

18 The Government relies heavily upon *Monzon v. City of Murrieta*, 978 F.3d at
19 1161 where the Court found the use of deadly force reasonable when the van's event
20 data recorder, or 'black box,' showed that the van's acceleration pedal was repeatedly
21 pressed down between 80 and 99 percent during the very short 4.5 seconds from start
22 to impact. Here we have no black box data showing any such attempt at rapid
23 acceleration. Even though the Agents, gas station customer (and off-duty SDPD Officer
24) Brian Moreno, and one of the cousins heard a high-pitched whine from the car there is
25 no independent evidence of attempted acceleration. Both sides experts agreed that the
26 whine was likely caused by the car being stuck in neutral. Even further, once the car
27 was put in drive, the irrefutable video evidence shows it moved forward slowly and did
28 not lurch, and that it was turning to the left away from AGent Godreau, and not toward

1 Agent Matthews. Either had ample time to get out of the way. Finally, Estrada's car did
2 not reach the same speed as the van, which accelerated to over 17 mph before hitting
3 the cruiser.

4 **C. Analysis**

5
6 In this case, the facts are indisputable. ESTRADA's vehicle had come to a full
7 stop when it was blocked from behind after it backed up after hitting the curb. The
8 high-speed chase had come to a halt. The car was damaged and was on dry level and
9 relatively well-lit terrain. Its wheels were turned to the left, toward the only possible, if
10 improbable avenue of escape, away from any agent at possible risk, even Agent
11 Matthews, who had ample time and cover. The only agent anywhere near the front of
12 the car, Agent Godreau, also had ample time and a clear route to avoid the vehicle, just
13 as Agent Baker had a few moments earlier. Despite the high-pitched whine, none of the
14 agents fired when they heard it. Only 3 of the 6 Agents fired¹¹ beginning at 1.6 seconds
15 after the car began to move forward to the left at a speed of 5-7 mph. In other words,
16 someone flinched, and a man is now dead.

17 Ultimately, it was Agent Godreau who violated policy and sound practice and
18 intentionally placed himself in harm's way by approaching an operating vehicle from
19 the front.

20 As to the familial association claim, Agent Godreau had sufficient time to
21 deliberate as he exited his vehicle, unholstered his weapon, and approached a vehicle
22 from the front (in violation of policy). He had ample time to deliberate in the several
23 seconds before the vehicle slowly started moving forward and to the left, away from
24 him.

25 **V. CONCLUSION**

26
27 In sum, the Government contends that the Agents were "not expecting the

28

¹¹ It is fortunate that none of the other agents were shot by Godreau, Alba, or Matthews when they were all at risk of crossfire.

1 outcome or the situation to develop as it did. The driver's actions were unexpected,
2 dynamic, and chaotic. . . .“ Exhibits 12 & 16 @ MSJ 252:17-19 & 261:28. If this is
3 true, it was the height of irresponsibility for Agent Godreau to move toward a vehicle
4 with its engine running, in violation of policy. It was this dynamic that led the Agents
5 to believe they had no option to shoot¹². While the Agents may have subjectively feared
6 for their safety, the objective facts showed the vehicle was turning away from Godreau,
7 who had enough time to get out of the way of a slow-moving vehicle. Agent Matthews
8 was at no risk.

9 Agent Godreau could have avoided the slow-moving vehicle. Agent Matthews
10 was not at risk. As a result, Summary Judgment should be entered for Plaintiffs. If not,
11 it should certainly not be entered for the Government, and the Court should proceed to
12 trial based on its assessment of the credibility of all involved.

13
14 Respectfully submitted,

15
16 Dated: September 29, 2023

By: /s Keith H. Rutman

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¹² which is what J.C. Smith was stating